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Supreme Court, U.S.
FILED
APR 9 1990
CLERK

No. 89-601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICES, *et al.*,
Petitioners,

v.

MARIE LUCIE JEAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES, AS AMICUS CURIAE ON BEHALF OF RESPONDENTS

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April 9, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF AMICUS CURIAE

The National Organization of Social Security Claimants' Representatives ("NOSSCR") is a non-profit corporation. Its membership includes attorneys, both in private practice and in programs providing legal services to the poor, who represent individuals seeking disability benefits from the Social Security Administration. In the course of that work, NOSSCR members often file civil actions in the United States district courts on behalf of clients whose disability benefits improperly have been terminated or denied.

The Equal Access to Justice Act, 5 U.S.C. § 504 (1988), 28 U.S.C. § 2412 (1982 & Supp. IV 1986) (the

"EAJA") directly benefits Social Security claimants who win district court reversals of unreasonable agency denials of disability benefits.[1] Fee awards under the EAJA typically reimburse prevailing disability claimants for attorney's fees that otherwise would have to be paid from the claimant's past-due benefits. *See* § 206(b) of the Social Security Act, 42 U.S.C. § 406(b) (1982). NOSSCR's interest in this case is on behalf of its members and their disabled clients who would be denied the benefits of the EAJA if petitioners' construction of that statute were adopted.

SUMMARY OF ARGUMENT

In enacting the EAJA, Congress sought to "ensure that individuals . . . [would] not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights." H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985) ("1985 House Report"). This Court has recognized that in so doing, Congress did not intend to throw litigants "a lifeline that it knew was a foot short." *Sullivan v. Hudson*, 109 S. Ct. 2248, 2256 (1989).

By its plain language the EAJA effectuates this legislative purpose in a simple and effective manner. The statute provides that when the federal government acts unreasonably it must pay the attorney's fees of the victim of that unreasonable action. An eligible claimant who

[1] District court reversals of agency denials of disability benefits represented between 93 and 95 percent of the successful fee claims under the EAJA in 1988 and 1989. *See* Administrative Office of the United States Courts, Report of the Director on Fees and Expenses Awarded Under the Equal Access to Justice Act (1989) ("1989 Report of the Administrative Office"). Relevant statistical information from this report is contained in Tables 1 and 2 of the Appendix to this Brief. *See also* Administrative Office of the United States Courts, Annual Report of the Director 100-06 (1988) ("1988 Report of the Administrative Office").

"prevails" in a "civil action" or "adversary agency adjudication" against the United States is entitled to attorney's fees if the "position of the United States" either in court or at the administrative level was not "substantially justified."

The EAJA does not contemplate or speak in terms of bifurcated proceedings or separate "actions" for the merits portion of the case and the subsequent determination of the entitlement to and amount of fees. To the contrary, the statute speaks only in terms of a unitary "civil action." This Court recently found that the unitary "civil action" contemplated by Congress was sufficiently broad to encompass administrative proceedings ordered on remand by the district court. *See Sullivan v. Hudson*, 109 S. Ct. at 2257. The only issue in determining whether a claimant is entitled to fees for work done in that "civil action" is whether the claimant has prevailed over an unreasonable government position. The entitlement decision follows naturally from the court's determination of the merits, and is not—as Petitioners repeatedly suggest—the subject of a separate action. The amount of the award is to be "reasonable," as defined in Section 2412 (d)(2)(A) and by this Court's decision in *Hensley* v. *Eckerhart*, 461 U.S. 424, 433-34 (1983),[2] and is subject to reversal or modification only if the court below has abused its discretion. *Pierce v. Underwood*, 108 S. Ct. 2541, 2553 (1988).

In this case, petitioners seek to avoid paying the attorney's fees incurred by the prevailing party in responding to the government's challenge to its request for fees under the EAJA ("fees on fees"). Petitioners concede

[2] Although *Hensley* arose under 42 U.S.C. § 1988, the Court there stated: "The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n.8. Indeed, in *Pierce v. Underwood*, 108 S. Ct. 2541, 2553 (1988) this Court apparently ratified that approach in the EAJA context.

that the government acted unreasonably here and that the request for attorney's fees by the victim of that unreasonable action was necessary to obtain the EAJA-mandated fees. Petitioners assert, however, that this final necessary step to secure the fees should be viewed as an independent "civil action" in which the government is given a second opportunity to escape from the consequences of its unreasonable action. Petitioners argue that the government should be allowed to oppose the fee request—and litigate the issue without limitation, so long as its position opposing the fees is not unreasonable—and not be required to compensate the victim for defending against the government's challenge to his fee award. This position is inconsistent with both the language and legislative purpose of the EAJA. Adoption of that position would not merely shorten the EAJA lifeline thrown by Congress, it would tangle that lifeline beyond repair.

Petitioners contend that the substantive finding of unreasonable conduct by the government on the merits should be disregarded, and the government permitted a second opportunity—based on a newfound posture of reasonableness—to deter victims from ever pursuing vindication, by creating the possibility of substantial uncompensable legal costs. This "two bites of the apple" approach, resting upon an artificial bifurcation of the civil action, specifically has been rejected by Congress and is inconsistent with the plain language of the statute.

Congress, in its 1985 amendments to the EAJA, explicitly rejected the kind of bifurcation advocated by petitioners. The 1985 amendments clarify the threshold for entitlement under the EAJA. In those amendments, Congress defined the term "position of the United States" so as to eliminate the possibility that the government could act unreasonably, and then take a reasonable litigating position in order to insulate itself from liability for fees. Petitioners' arbitrary attempt to divide the "civil action" under the EAJA into two unrelated pieces

also is inconsistent with this Court's recent decision in *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989), and with this Court's interpretation of similar language in other fee-shifting statutes.

Petitioners' reading of the EAJA directly contradicts Congress' fundamental purpose in enacting that statute. Despite their repeated protests that an "infinite regression" of oppositions to fee petitions is merely a theoretical possibility, Petitioners' core argument is that the court must determine whether the "position of the United States" was reasonable for each identifiable stage in the litigation of a claim. Each such sub-question of substantial justification would be a mixed question of law and fact, requiring legal analysis at the district court level and raising the possibility of appealable issues. Petitioners' theoretical possibility would in fact be the inevitable reality under their view of the EAJA.

In addition to creating the potential for judicial gridlock, Petitioners' gloss on the statute would place successful claimants at the mercy of government attorneys capable of forcing them through an endless series of potentially uncompensated legal arguments and appeals over attorney's fees. This Court repeatedly has stated that disputes about attorney's fees should not become a second major litigation. Adoption of Petitioners' position would do just that. It would create second, third, and fourth rounds of attorney's fee litigation, which ultimately would dwarf the merits litigation in complexity and expense. Moreover, the government would be free to pursue its larger agenda—seeking, as in *Hudson* and in this case, to clarify EAJA issues wholly unrelated to the reasonableness of the claimant's fee request through lengthy and expensive appeals to the Court of Appeals and to this Court—and then force the individual claimant to foot the bill for such "test case" litigation even where the claimant ultimately prevails in that litigation. There can be no doubt that adoption of Petitioners' position would mean that a victim of unreasonable government

action seeking to obtain the assistance of counsel would face the prospect of substantial uncompensated legal work in order to obtain a modest fee award. That is just the type of economic deterrent to vindication of rights that the EAJA was intended to prevent.

Finally, Petitioners' argument rests on a depiction of the EAJA in operation that is flatly wrong. In attempting to create a policy rationale for its reading of the statute, Petitioners paint a picture of the United States government held ransom by a flood of unreasonable fee requests. That picture is wildly inaccurate. Statistical data provided to Congress by the Administrative Office of the United States Courts [3] and the Administrative Conference of the United States [4] demonstrate that (1) the vast majority of fee requests involve very small sums of money, (2) the overall amount of fees awarded by courts is relatively small, and (3) the trial judge, conspicuously ignored by Petitioners, performs a significant mediating role in arriving at an appropriate fee award.

Petitioners' entire analysis ignores the fact that when Congress threw social security claimants and other litigants a "lifeline" it did not do so blindly. By requiring the district court judge to calculate a "reasonable" award, Congress placed the lifeline in capable hands. The available empirical evidence suggests that the presence of judges has had the desired effect of discouraging unreasonable fee requests and that judges have not hesitated promptly to reduce any such requests. Accordingly,

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[3] 1989 Report of the Administrative Office. *See* Appendix Tables 1 and 2.

[4] Administrative Conference of the United States, Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act—October 1, 1987-September 30, 1988 (Feb. 6, 1990) ("1990 Report of the Administrative Conference"). Relevant statistical information from this report is contained in Table 3 of the Appendix to this Brief.

the specter of overstated fee requests and ensuing extensive fee litigation at the expense of taxpayers is simply not borne out by the facts.

ARGUMENT

I. PETITIONERS' READING OF THE EAJA IS CONTRARY TO THE LANGUAGE OF THE STATUTE AS INTERPRETED BY THIS COURT

Petitioners characterize "civil actions" under the EAJA as bifurcated proceedings in which purportedly separate "merits" and "fees" litigations are subject to separate and distinct threshold requirements of government unreasonableness. This separate actions/dual thresholds approach is contradicted by the language of the statute, as most recently amended,[5] and the decisions of this Court construing that statutory language. In particular, Petitioners' argument rests on a misguided interpretation of two critical phrases in the statute: (1) "position of the United States," as defined in Section 2412(d)(2)(D), in connection with the threshold requirement of unreasonable government action; and (2) "civil action," as interpreted by this Court, in connection with the scope of the proceeding and the proper amount of the award.

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[5] Section 2412(d)(1)(A) of the EAJA provides as follows:

> Except as otherwise specifically provided by statute, a court shall award to a *prevailing party* other than the United States *fees and other expenses*, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any *civil action* (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the *position of the United States* was *substantially justified* or that special circumstances make an award unjust.

(Emphasis added).

A. The Threshold of Entitlement: Defining the "Position of the United States"

As noted, the legislative purpose in enacting the EAJA was to encourage and assist the victims of unjustified governmental action to vindicate their rights by limiting the financial disincentive associated with the high cost of obtaining legal assistance. The requirement for fee entitlement under the EAJA is "prevailing" in a "civil action" against a governmental action—a "position of the United States"—that was not "substantially justified." Petitioners recognize this statutory test, but posit a separate "position of the United States"—and an accompanying separate "substantial justification" test—in connection with the actual fee request. In arriving at this interpretation, Petitioners misread the statutory definition of the term "position of the United States"; fail to recognize that the substantial justification of the government's litigating positions has no bearing whatsoever on the amount of the award; and seek to relitigate an issue foreclosed by Congress in its 1985 reenactment and amendment of the EAJA.

Prior to the 1985 EAJA Amendments, a split developed among the circuits over the meaning of the term "position of the United States." Some courts held that the "position of the United States" referred only to the government's litigating position.[6] Others took the broader view that the "position of the United States" included the underlying governmental action that led to the litigation in the first place.[7] Congress resolved this

[6] *Spencer v. NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); *Ashburn v. United States*, 740 F.2d 843, 849 (11th Cir. 1984); *Boudin v. Thomas*, 732 F.2d 1107, 1115 (2d Cir. 1984); *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1487 (10th Cir.), *cert. denied*, 469 U.S. 825 (1984); *Tyler Business Servs., Inc. v. NLRB*, 695 F.2d 73, 75 (4th Cir. 1982).

[7] *National Resources Defense Council, Inc. v. EPA*, 703 F.2d 700, 710 (3d Cir. 1983); *see also Del Mfg. Co. v. United States*, 723 F.2d 980, 986-89 (D.C. Cir. 1983) (Wald, J., dissenting).

split in circuits in 1985 when it added 28 U.S.C. § 2412 (d)(2)(D) to the statute. That section provides that:

> "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings . . .

The legislative history is crystal clear as to Congress' intent in enacting this amendment. Congress wished to focus the attention of courts on the underlying governmental behavior which gave rise to the entitlement to fees. The 1985 House Report states:

> [T]he amendment will make clear that the Congressional intent is to provide attorneys' fees when an unjustifiable agency action forces litigation, and the agency then [tries] to avoid such liability by reasonable behavior during the litigation.

Id. at 11.[8]

Congress was emphatic that simply taking a reasonable litigating position would not insulate a party from liability for fees:

> In clarifying the "position" term, the Committee expressly rejects the holding of the District of Columbia Circuit in *Spencer v. N.L.R.B.*, 712 F.2d 539, 557 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 1908 (1984), that the only government "position" to be scrutinized in the context of an EAJA case is that taken in the litigation itself.

[8] The bracketed language reflects corrections made to the original text in H.R. Supp. Rep. No. 120, 99th Cong., 1st Sess., Part II, 4-7 (1985) ("1985 House Supplemental Report"). This statement was made in reference to the portion of the EAJA which was later codified as 5 U.S.C. § 504(a). This reference was made expressly applicable to § 2412(d)(2)(D) by reference at page 17 of the 1985 House Report: "The term 'position of the United States' has been discussed in relation to subsections 1(a)(1) and 1(c)(4)."

This restrictive view, adopted by several other courts of appeal has resulted in the denial of a number of meritorious fee claims, because it fails to focus attention on the unjustified government activity that formed the basis of the litigation.

If the government's litigation position was the sole consideration, the government could insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed "reasonable" litigation positions; thereby having the effect of substantially justifying their position. *Environmental Defense Fund v. Watt*, 554 F. Supp. 36, 41 (E.D.N.Y. 1982). Interpreting the EAJA so as to restrict its application to mere litigation arguments and not the underlying action which made the suit necessary, would remove the very incentive for careful agency action that Congress hoped to create in 1980. *National Resources Defense Council v. EPA*, 703 F.2d 700, 710 (3d Cir. 1983).

> The Committee's clarification of the "position" term is intended to broaden the court's or agency's focus of inquiry for EAJA purposes beyond mere litigation arguments, and to require an assessment of those government actions that formed the basis of the litigation.

Id. at 12-13.[9]

Moreover, the legislative history of the EAJA speaks directly to the question of fees on fees. In discussing the question of fees awarded at the agency level, the 1985 House Report states that:

> In addition, the Committee notes that fees incurred by a party when a fee award or denial is appealed are recoverable as part of the final fee award.

1985 House Report at 17.

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[9] Again, this language appears in reference to the portion of the EAJA which was codified at 5 U.S.C. § 504(a)(1). As noted above at footnote 8, this language subsequently was incorporated by reference into the discussion of § 2412(d)(2)(D).

Reaching the conclusion that a reasonable litigating position in the fee portion of the "civil action" does not provide a defense to liability for fees on fees does not, however, require resort to the legislative history. It is compelled by inference from the text of the statute. By including the last clause of § 2412(d)(2)(D) Congress specifically recognized the possibility that, in eliminating the "litigation position" defense to fee liability, it could create automatic liability for all fees. To deal with this possibility, Congress stated that "fees . . . may not be awarded . . . for any portion of the litigation in which the party has unreasonably protracted the proceedings." In carving out this limited exception, Congress made no suggestion that a reasonable government litigating position would constitute a defense to a fee award. Indeed it stated just the opposite in establishing that only where claimant acts unreasonably is there a per se defense to fee liability, and then only for the unreasonable portion of the fee.

The 1985 Amendments and the statute as a whole thus make clear that unjustified agency action triggers EAJA liability for attorney's fees regardless of the reasonableness of the government's subsequent litigating positions. The "litigating position" seized upon by Petitioners here —opposition to the fee request—is indistinguishable from any other of the many litigation positions taken by the government. The 1985 Amendments make clear that the reasonableness of any such losing litigating position is no defense to a claim for fees. Petitioners have shown no reason why such a litigating position should be a defense to a claim for fees incurred in obtaining the fees.[10]

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[10] The Second Circuit in *Trichilo v. Secretary of Health & Human Services*, 823 F.2d 702 (2d Cir. 1987), explains the point well:

> Severing separate parts of the litigation for purposes of determining the availability of counsel fees is inappropriate in view of this congressional mandate to look not at the government's litigation position, but rather at the underlying ac-

Petitioners' arguments amount to no more than a vain attempt to end run the 1985 Amendments and resuscitate the "litigation position" as a method for insulating the government from liability for fees. Such a club in the hands of the government would have a chilling effect on the willingness of lawyers to undertake cases in which their compensation depended upon a fee award under the EAJA.

B. Scope: Legal Services in a Unitary "Civil Action"

Section 2412(d)(1)(A) states that "a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any *civil action*." (Emphasis added). In *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989), this Court examined the meaning of the term "civil action" as used in § 2412. The decision in *Hudson* recognized that "civil action" within the meaning of the EAJA encompasses the entire litigation, defined broadly to include any work that was "necessary" to obtain the results sought. Thus once the threshold to entitlement has been crossed—a claimant prevailing over an unreasonable government action—the civil action for which the government bears fee liability cannot thereafter be subdivided or bifurcated to limit the government's exposure.

In *Hudson*, the issue was whether, in a Social Security disability case, proceedings on remand from the district court were part of the "civil action" defined in § 2412. There this Court looked to cases decided under other fee-shifting statutes and stated that:

> Our past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of

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> tion that spawned the litigation in the first place. . . . [T]here is no reason to divide up phases of the litigation for examination. In short, if the underlying agency action was not substantially justified, the victim of that unjustified action is entitled to all reasonable attorney's fees, including those incurred on the fee application.

823 F.2d at 708.

> the judicial action and necessary to the attainment of results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded.

Id. at 2255.

In reaching this conclusion, the Court examined cases decided under similar fee statutes that made fees generally available for all work that was "reasonably necessary" to achieving the goals of the litigation. This Court looked to *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546, 557-61 (1986), for example, which held that under the Clean Air Act the costs of representation before federal and state administrative agencies in defense of the provisions of a consent decree were compensable under the fee-shifting provision of that statute. The Court also examined *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 60-63 (1980) which held that under the fee-shifting provision of Title VII, a federal court could award attorney's fees for services performed in state administrative and judicial enforcement proceedings. Finally, the Court examined *Webb v. County Board of Education*, 471 U.S. 234, 243 (1985) which held that work performed in administrative proceedings that is "both useful and of a type ordinarily necessary to advance civil rights litigation" may be compensable under 42 U.S.C. § 1988 (1982). After examining these cases, the Court held that their logic leads to the conclusion that remand proceedings before the Social Security Administration could properly be considered part of the "civil action" before the district court for the purposes of making an EAJA award.

This case is easier than *Hudson*. There at least, a question existed as to whether an administrative proceeding on remand came within the four corners of the "civil action." Here there is no such question. The litigation over the amount of a fee is part and parcel of the same "civil action"; indeed, it is the inquiry mandated by the

EAJA itself. The fee request is heard by the same judge, carries the same docket number, and, by definition, was spawned by the same unreasonable governmental action that created the entitlement to the award. Nothing in the language of the statute even remotely suggests that Congress intended that the determination of what fee is reasonable should acquire independent status under the EAJA.

Indeed, even if the fee dispute were not so clearly an integral part of the "civil action," resolution of the dispute is quintessentially "necessary to the attainment of the results Congress sought to promote by providing for fees," *Hudson*, 109 S. Ct. at 2255. Again, as the Second Circuit stated in *Trichilo*:

> To begin with, the very purpose of the EAJA is to ensure that persons aggrieved by unreasonable governmental actions are not prevented from vindicating their claims by the potentially high costs involved in doing so. Since the statute primarily assures prevailing plaintiffs their reasonable attorney's fees, it would be ironic if claiming those very fees—which would have been unnecessary if not for the governmental action—was the one act for which a claimant could not receive compensation. Since the purpose of the EAJA is to remove counsel fees as an impediment to challenging unreasonable and unjustified governmental actions, where a governmental action has been shown to have been unjustified, there should be as little disincentive for plaintiffs to obtain attorney's fees as there is for them to challenge the action itself. The government asks us "to treat the EAJA application as part of counsel's cost of doing business." To do so, however, would leave it in the power of the government, which already has been unjustified in its actions toward plaintiff, to so raise the cost of plaintiff's counsel's 'doing business' simply by strenuous resistance to all fee applications as to discourage or

> economically prevent a plaintiff from litigating against the government in the first place.

823 F.2d at 707.

Finally, this interpretation of the term "civil action" is consistent with the 1985 amendment to Section 2412(d)(2)(D), discussed above, that requires courts to view the action as a whole rather than as individual litigating positions.

C. Government's Liability: Fees and Other Expenses

Petitioners' attempt to create a separate and distinct requirement of independent unreasonable government action with regard to a fee dispute under the EAJA is contradicted by the language of Section 2412(d)(2)(A) which details the method for calculating fees. Nowhere in that section does the term "substantial justification" appear. Section 2412(d)(2)(A) provides for the award of a

> reasonable attorney fee[] . . . based upon prevailing market rates for the kind and quality of services furnished, except . . . not . . . in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee. . .

As noted, this Court has spoken at length about what constitutes a 'reasonable fee," and the method for calculating such a fee. The basic method to be used is set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983):[11]

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by

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[11] In *Hensley* this Court stated that the method set forth therein was of general applicability. 461 U.S. at 433 n.8. This Court ratified this approach in the EAJA context in *Pierce v. Underwood*, 108 S.Ct. 2541, 2553 (1988). *See* note 2, *supra*.

> a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where documentation of hours is inadequate, the district court may reduce the award accordingly.

Id. at 433-34.

Multiplying the number of hours worked by the hourly rate does not end the inquiry. The Court also defined the proper approach in cases involving partial success on multiple claims.

> There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Id. at 434.

The *Hensley* Court also made clear that this was not to be an overly mechanical inquiry, and that the determination of the amount of an award was committed to the discretion of the judge, saying:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion,

> however, must be exercised in light of the considerations we have identified.

Id. at 436-37.[12]

The teachings of *Hensley* on this issue are more than adequate in guiding district courts in the awarding of fees under the EAJA, and provide sufficient protection against unreasonable fee requests. Nothing in the statutory language of the EAJA suggests that Congress intended that the approach followed in these cases should be overridden—and the discretion of the district judge usurped—by the application of a multi-tiered and recurring threshold test of substantial justification.

Thus, under the EAJA, the inquiry into entitlement requires a court to engage in a two step inquiry. First, the court determines whether an eligible claimant has "prevailed" in a "civil action" against the United States. Second, the court determines whether the "position of the United States" as defined in Section 2412(d)(2)(D) was "substantially justified." If these criteria for entitlement are met, the court then calculates the amount of a "reasonable" fee. To do so, the court applies the principles set forth in Section 2412(d)(2)(A) and this Court's decision in *Hensley*. On appeal, that amount is subject to reversal or modification only if the district court abuses its discretion. *Pierce v. Underwood*, 108 S. Ct. at 2553.

II. SEVERING THE FEE DISPUTE FROM THE LITIGATION ON THE MERITS WOULD BE INCONSISTENT WITH THE ESSENTIAL LEGISLATIVE PURPOSE OF THE EQUAL ACCESS TO JUSTICE ACT

Petitioners concede that "Fee litigation is . . . part of the 'civil action.'" Petitioner's Brief at 17. This

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[12] This Court recently reaffirmed the principles set forth in *Hensley* in *Texas State Teachers Association v. Garland Independent School District*, 109 S. Ct. 1486, 1491-92 (1989).

should end the inquiry. Petitioners nevertheless repeatedly strain to assert that fee litigation is separate and distinct from the litigation on the merits. Petitioners' basic premise is that it would be logically inconsistent to "impose a standard of liability for the fee litigation phase of the action that is different from . . . the standard set forth in the Act." *Id.* The short answer is that both phases are part of the *same* action and therefore share the very same threshold standard of liability: government action that is not substantially justified. Once that standard is met for the "merits phase," it is satisfied for the "fees phase."

A. Petitioners' Argument Is Logically Flawed

Petitioners make three policy arguments in favor of their interpretation of the statute:

(1) the Eleventh Circuit's position would chill legitimate enforcement efforts;

(2) the Eleventh Circuit's position would require the government to pay fees even when it makes arguments which ultimately succeed; and

(3) Petitioners' interpretation would deter unreasonable fee requests.

The first two arguments rest on Petitioners' failure to distinguish the inquiry into entitlement from the resolution of disputes about amount. The third ignores the full effect of the government's argument: not only would Petitioners' position deter unreasonable fee requests, it also would deter reasonable fee requests by placing all prevailing parties at the mercy of the government's whim.

First, Petitioners are correct that by enacting the EAJA Congress did not wish to chill legitimate enforcement efforts. It did, however, wish to encourage challenges to unreasonable governmental behavior. It struck a balance between those seemingly conflicting goals by distinguishing the threshold for entitlement from the inquiry into the amount of the award. To protect enforcement, Congress established a threshold for entitlement that goes beyond merely prevailing and requires unreasonable governmental action to form the basis for the claim. Once the entitlement to fees is established, however, Congress left the determination of amount to the discretion of the judge guided by the considerations set forth in Section 2412(d)(2)(A) and *Hensley*. *See Pierce v. Underwood*, 108 S. Ct. at 2553.

Second, Petitioners' argument that the Eleventh Circuit's reading of the EAJA would force the government to compensate claimants even for arguments as to which the government prevails is simply wrong. Under the framework set forth in *Hensley*, nothing prohibits the court when awarding fees on fees from taking into consideration the reasonableness of the prevailing party's effort to establish the amount of fees. Indeed, that is the mandate of the Eleventh Circuit's position in this case.

Finally, Petitioners argue that reopening the question of substantial justification will deter unreasonable requests. To the contrary, its sole effect would be to impair the functioning of the statute by placing litigants at the mercy of governmental whim. Government lawyers faced with fee petitions would have nothing to lose and everything to gain by strongly opposing every fee request so long as some plausible grounds could be found to place the issue in dispute. Fee awards are small, and appeals are expensive. It is not difficult to imagine that the cost of litigating over fees in three courts, as in this case, could dwarf the amount of fees actually in dispute. As discussed at pages 24-25 *infra*, and demonstrated by the data contained in Tables 1 and 2 of the Appendix, the average EAJA award by a court is $4,482. The amount of fees on fees is only a small portion of that. The cost of an appeal could easily exceed the amount of fees at issue. From the government's perspective the effort may be justified for policy considera-

tions beyond the particular case. For the prevailing party, however, the only issue is whether his fees are paid. Few lawyers would be willing to bear the cost of litigating the policy issue just to recover the small amounts of fees at issue.

Indeed, Petitioners concede that:

> [I]t is . . . true, at least as a theoretical matter, that inquiring into whether the government was substantially justified in arguing in fee litigation that its position on the merits was substantially justified could lead to an "infinite regression," with the government asserting in response to each succeeding fee application that its defense to the preceding application was substantially justified.

Brief of Petitioners at 29. Petitioners' dismissal of the infinite regression possibility is based on the assertion that it has not occurred in the circuits that have adopted its position. This explanation is insufficient. Indeed *Pierce*, *Hudson*, and this case provide evidence of the government's willingness to litigate aggressively over attorney's fees questions. Moreover, rather than inspiring voluntary restraint by the government, it is far more likely that the effect of the rule has been to cause claimants simply to give up on their fees rather than undertake a potentially costly battle against the government.

Finally, Congress was cognizant of the possibility of unreasonable behavior by fee claimants, and the EAJA provided a mechanism for dealing with it. In § 2412(d)(2)(D), the statute provides that a fee award shall be reduced if the plaintiff unreasonably prolongs the litigation. That determination is made as part of the inquiry into whether the fee requested is reasonable. Petitioners instead seek to establish an entirely different and more burdensome mechanism for making the same determination: a mechanism that would swallow the required statutory inquiry, and lead to consequences inconsistent with the essential purposes of the EAJA.

III. PETITIONERS' ARGUMENTS REST ON AN INACCURATE EMPIRICAL PICTURE OF THE EAJA IN ACTION

Petitioners' argument rests on a picture of the EAJA in operation that is simply wrong as an empirical matter. In support of its position, Petitioners paint a picture of the United States government held ransom by a flood of unreasonable fee requests. However, statistical data provided by the Administrative Office of the United States Courts [13] and the Administrative Conference of the United States [14] belie Petitioner's parade of horrors. These statistics demonstrate that: (1) the present case is not the typical EAJA case; (2) the total amount awarded under the EAJA by courts and agencies is relatively small and indeed is less than Congress expected when it reenacted the statute in 1985; and (3) judges faced with an unreasonable fee request have the ability, and indeed do not hesitate, to reject an amount that is unreasonable. The third point is perhaps the most important, in that it strongly suggests that the active presence of the judge, as called for in the plain language of the statute, imposes any necessary discipline on the amount of fee requests.

A. This Is Not a Typical EAJA Case

The fee awarded by the district court in this case reflects the unusual nature of the case, its size, length and complexity. A cursory review of the statistics contained in Tables 1 and 2 of the Appendix to this Brief demonstrates how the typical EAJA claim differs from the claim at issue here.

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[13] *See* 1989 Report of the Administrative Office. Relevant statistical data from this report are contained in Tables 1 and 2 in the Appendix to this Brief. *See also* 1988 Report of the Administrative Office.

[14] 1990 Report of the Administrative Conference. Relevant statistical information from this report is contained in Table 3 of the Appendix to this Brief.

The typical EAJA fee awarded by a court is generally quite small. Social Security claimants who have won relief in court are the principal beneficiaries of EAJA awards. In 1988 and 1989, Social Security claimants who won reversals of the agency's disability determination in district court represented between 93 and 95 percent of the successful fee claimants under EAJA. Sixty-one percent of the total dollars awarded under EAJA in statistical year 1989 were in these disability cases.[15] In statistical year 1989, district courts and courts of appeals granted EAJA fees and expenses in 383 cases against HHS, and awarded a total of $1,133,-938 to Social Security claimants. Hence, the average award in the most common type of EAJA case was $2,961. This is well in proportion to the amount of benefits at stake in disability cases. Indeed, the average EAJA award for all types of cases in 1989 was $4,482, far below the amount of fees at stake in the present case.

EAJA also applies at the agency level. Under 5 U.S.C. § 504 (1988), agencies are also required to award fees when the United States takes an unreasonable position in an "adversary" agency adjudication. *See Sullivan v. Hudson*, 109 S. Ct. at 2255. Awards at the agency level are no different than those awarded by courts. The amount is typically quite small. As Table 3 demonstrates, the average award made by agencies in fiscal years 1982-1988 was $3,278.[16]

B. The EAJA Has Not Led to Burdensome Governmental Liability

Notwithstanding the importance of EAJA fees to Social Security claimants, it is important to note that,

[15] In statistical year 1988, 47 percent of the dollars awarded under EAJA were awarded in cases against HHS. This low percentage is primarily because of two large awards made that year. *See* 1988 Report of the Administrative Office at 103-04.

[16] 1990 Report of the Administrative Conference.

after six years in effect, the EAJA has not proven to be burdensome to the public fisc. Congress noted when it reenacted the EAJA in 1985 that it had not proven to be nearly as expensive as originally predicted. Since reenactment, the total amount awarded under the statute has even been less than the amount predicted in the revised 1985 cost estimate.

The House Report, relying on information gathered by the Administrative Office of the United States Courts and the Administrative Conference of the United States stated that:

> Between October 1, 1981 (the effective date of the Act) and October 1, 1984, approximately $3.9 million have been awarded under the Act. . . . These awards are dramatically less than the $100 million annual cost estimated by the Congressional [Budget] Office (CBO) in 1981 and higher amounts predicted by the Justice Department.

1985 House Report at 8-9. Indeed, when Congress reenacted the EAJA it expressed some dissatisfaction with the low amount of fees awarded under the statute, noting that "part of the problem in implementing the Act has been that agencies and courts are misconstruing the Act." *Id.* at 9. The response to this dissatisfaction was the enactment of § 2412(d)(2)(D) which defined "the term "position of the United States."

In 1985, the Congressional Budget Office again projected the future cost of the amended EAJA, making the following assumptions:

> The number of parties recovering fees has grown from 20 in fiscal year 1982 to 64 in 1983 to 198 in 1984. If that number continues to increase by about 130 each year, it would reach 1,000 in 1990. We estimate an average award of $6,000 and assume that it will remain roughly constant. (The average award was $5,600 in[] 1984). We also expect that a few unusually large awards will be made, aver-

> aging approximately $500,000 apiece. We assume that one of these large awards will be made in both 1986 and 1987, and two in each subsequent year through 1990. On this basis, we project costs reaching about $7 million [in] 1990.

1985 House Supplemental Report at 3. The extent to which even these projections have turned out to be inflated is demonstrated by the data contained in Tables 1 and 3 of the Appendix.

In the courts, the total amount awarded under EAJA has not exceeded $4,000,000 in any single year, and over the last two years has hovered at approximately $2,000,000. The number of applications has remained relatively constant over the last three years at approximately 500, and has never exceeded 700. The number of fee applications granted has been stable over the last three years at approximately 400. And, as noted, the average award by a court in fiscal 1989 was $4,482, well below the $6,000 predicted. 1989 Report of the Administrative Office at 69.

As the data in Table 3 indicate, the picture is the same in the administrative agencies. The total amount awarded has been exceedingly small. Between 1982 and 1988, a total amount of $1,193,231 was awarded, or an average of $170,462 each year.[17] The number of applications filed has never exceeded 300, and in fiscal 1988 the number actually declined to 210 from 267 the year before. Finally, in fiscal years 1982-1988, the average award by an administrative agency was $3,278, far below

[17] In 1988, the total amount awarded reached an all time high of $513,795.65. This was due primarily to the settlement by HHS of *Underdue v. Bowen*, No. K-83-3885 (D. Md. 1987), which enabled certain fee applicants to file with HHS after the statutory filing deadline had passed. *See* 1990 Report of the Administrative Conference at App. V. This far exceeds the previous high and is probably a statistical aberration.

the $6,000 predicted by the CBO. Indeed, in fiscal 1988 the average successful fee applicant received only $1,828.

Thus in most cases the fee award is relatively small. Fees on fees represent only a tiny portion of that award. Simply by forcing a claimant to defend a fee award on appeal, the government may double the amount of time a lawyer must spend on his or her case. If fees on fees are not allowed, the expense to the claimant may not be worth the effort, and the claimant may give up on fees to which he or she is legally entitled. That would defeat the very purpose of the EAJA.

C. Petitioners Have Ignored the Role of the Judge in Calculating a Reasonable Award

Perhaps most importantly, these statistics, and the discussion above, demonstrate that Petitioners have completely ignored the mediating role of the trial judge in determining the appropriate amount of a fee award. Petitioners' brief seems to assume that the only thing standing between the EAJA claimant and the public fisc is the government lawyer. Last year courts denied 20% of all fee applications outright, and Table 2 demonstrates that courts have not hesitated, when presented with an unreasonable fee request, to reduce the award to an appropriate level, sometimes by as much as 80%. Thus, as noted above, it is important to remember that the lifeline thrown by Congress was placed in the hand of the district court judge. Adoption of Petitioners' argument would create a tremendous incentive for government attorneys simply to stand in the way of the toss.[18]

[18] Petitioners argue as a fallback position that if their reading of the statute is rejected, this Court should at least adopt the "technical defense" exception to fees on fees. The question of a technical defense is not presented by this case. Moreover, the arguments stated above apply with equal force to that interpretation. Indeed, Petitioners concede that such a reading is inconsistent with the statutory language.

CONCLUSION

This analysis and these statistics demonstrate that the position advocated by petitioners, far from remedying a problem, would place successful litigants at the mercy of government attorneys who would have the ability to force prevailing parties through an endless regression of legal argument and attorney's fees appeals in the pursuit of fees to which the government concedes they are statutorily entitled. This Court has stated repeatedly that litigation over fee disputes should not become a second major litigation. Adoption of Petitioners' interpretation would do just that; create second, third and fourth rounds of attorney's fee litigation, the sum of which would dwarf the merits litigation in complexity. Such a result is antithetical to the purpose of the EAJA. Accordingly, the opinion of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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April 9, 1990

APPENDIX

APPENDIX

Table 1

Decisions on Equal Access to Justice Act Applications
1984 Through 1989

Year	Total Applications	Applications Denied	Applications Granted	Total Awarded
1984	296	130	166	$1,417,211
1985	577	157	420	$1,912,768
1986	672	108	564	$2,567,910
1987	496	95	401	$3,878,033
1988	521	105	416	$2,027,997
1989	503	90	413	$1,850,906
Percent Change 1989 over 1988	−3.5	−14.3	−0.7	−8.7

Source: Administrative Office of the United States Courts, 1989 Annual Report of the Director

Table 2

Decisions on Applications for Equal Access to Justice Act Awards By Type of Court and Agency 1989

Court/Agency	Applications	Applications Denied: Number	Applications Denied: Total Fees and Expenses Claimed	Applications Granted: Number	Applications Granted: Total Fees and Expenses Claimed	Applications Granted: Total Amount Awarded	Nature and Amount of Awards *: A	B	C	D
Total	503	90	$1,561,263	413	$2,419,123	$1,850,906	$1,804,162	—	$13,372	$33,372
U.S. Courts of Appeals										
Commodities Futures Trading Commission	1	1	566,000	—	—	—	—	—	—	—
Dept. of Agriculture	2	1	8,750	1	14,127	14,127	14,127	—	—	—
Dept. of the Air Force	1	1	37,791	—	—	—	—	—	—	—
Dept. of the Army	5	4	55,600	1	15,750	15,750	15,750	—	—	—
Dept. of Commerce	2	2	14,925	—	—	—	—	—	—	—
Dept. of Health and Human Services	30	16	59,318	14	47,096	42,001	41,770	—	—	231
Dept. of Labor	2	2	11,300	—	—	—	—	—	—	—
Dept. of the Treasury	1	1	25,000	—	—	—	—	—	—	—
Equal Employment Opportunity Commission	1	1	73,494	—	—	—	—	—	—	—
Federal Energy Regulatory Commission	1	—	—	1	19,281	12,500	12,500	—	—	—
Immigration and Naturalization Service	4	2	13,100	2	3,384	3,384	3,384	—	—	—
National Labor Relations Board	2	1	15,000	1	17,394	8,697	8,697	—	—	—
Office of Personnel Management	1	1	19,000	—	—	—	—	—	—	—
Securities and Exchange Commission	1	1	44,000	—	—	—	—	—	—	—
U.S. Court of International Trade										
Dept. of the Treasury	2	2	50,181	—	—	—	—	—	—	—
U.S. Claims Court										
Dept. of the Air Force	1	—	—	1	156,790	37,990	24,618	—	13,372	—
Dept. of the Army	3	2	119,156	1	31,841	10,750	10,750	—	—	—
Dept. of Defense	5	1	13,339	4	155,052	77,416	76,450	—	—	966
Dept. of Housing and Urban Development	1	1	36,987	—	—	—	—	—	—	—
Dept. of the Interior	1	—	—	1	32,751	32,751	30,384	—	—	2,367
Dept. of Justice	1	—	—	1	93,844	23,079	21,137	—	—	942
General Services Administration	1	—	—	1	61,584	11,102	8,403	—	—	2,699
Internal Revenue Service	2	2	133,938	—	—	—	—	—	—	—
U.S. District Courts										
Dept. of Agriculture	3	—	—	3	48,120	18,602	18,058	—	—	544
Dept. of the Air Force	1	1	4,500	—	—	—	—	—	—	—
Dept. of the Army	1	1	**	—	—	—	—	—	—	—
Dept. of Energy	1	—	—	1	84,500	50,832	48,475	—	—	2,357
Dept. of Health and Human Services	411	42	119,594	369	1,201,074	1,091,937	1,080,913	—	—	11,024
Dept. of the Interior	2	—	—	2	44,956	43,955	43,675	—	—	280

Table 2—Continued

Court/Agency	Applications Denied: Applications	Applications Denied: Number	Applications Denied: Total Fees and Expenses Claimed	Applications Granted: Number	Applications Granted: Total Fees and Expenses Claimed	Applications Granted: Total Amount Awarded	Nature and Amount of Awards *: A	B	C	D
Dept. of State	1	—	—	1	150,000	146,318	146,318	—	—	—
Environmental Protection Agency	1	—	—	1	88,051	88,051	78,696	—	—	9,355
Federal Trade Commission	1	1	27,500	—	—	—	—	—	—	—
Food and Drug Administration	1	—	—	1	37,058	37,058	37,058	—	—	—
General Services Administration	1	—	—	1	50,000	22,184	20,577	—	—	1,607
Immigration and Naturalization Service	4	1	6,390	3	29,525	25,955	25,955	—	—	—
Securities and Exchange Commission	1	—	—	1	30,000	30,000	30,000	—	—	—
Veterans Administration	3	2	104,400	1	6,945	6,467	6,467	—	—	—

** Petitioner did not specify an amount in the request for attorney fees.

SOURCE: Administrative Office of the United States Courts, 1989 Annual Report of the Director

A = Attorney Fees

B = Study, Analysis, Engineering Report, Test, or Project

C = Expert Witness Fees

D = Other, including photocopying costs, telephone expenses, and transportation costs.

Table 3

Disposition of Applications for Awards of Fees and Expenses under the Equal Access To Justice Act in Administrative Proceedings

FY 1982-1988

Fiscal Year	Applications Filed	Applications Denied	Applications Granted	Amount Awarded
1982	103	31	0	$0.00
1983	88	53	8	$35,933.89
1984	146	76	13	$121,943.79
1985	56	63	11	$200,095.66 [1]
1986	128	54	21	$107,141.29 [1]
1987	267	60	30	$214,320.74 [1]
1988	210 [2]	94 [3]	281 [4]	$513,795.65 [1]
All Years	998	431	364	$1,193,231.00 [1]

[1] Does not include unknown amounts in settlement.

[2] The department of Health and Human Services reports 134 of the 210 cases filed in FY88 under the Act.

[3] The department of Health and Human Services reports 72 of the 94 cases filed in FY88 in which applications were denied .

[4] The department of Health and Human Services reports 240 of the 281 cases filed in FY88 in which application for fees was granted.

Source: Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under The Equal Access to Justice Act, February 6, 1990